

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DEREK BERING,

Plaintiff and Appellant,

v.

INTERINSURANCE EXCHANGE OF THE
AUTOMOBILE CLUB,

Defendant and Respondent.

D038120

(Super. Ct. No. GIC755523)

APPEAL from a judgment of the Superior Court of San Diego County, S. Charles Wickersham, Judge. Affirmed.

This action arises out of a civil complaint against plaintiff Derek Bering, his parents, and his stepparents, alleging that at a time when he was a minor he stole, conspired to steal, or negligently allowed others to steal goods, monies, and customer credit card information from a sporting goods business owned by Michael Cornell while Bering was employed there as a sales clerk. A judgment was rendered in this underlying

action (the Cornell action) against him. Bering thereafter filed a complaint against the defendant Interinsurance Exchange of the Automobile Club (the Exchange), alleging that it breached a homeowners insurance contract entered into with Bering's parents, Roger and Mrs. Roger Dyer (together the Dyers), by failing to defend him in the Cornell action, and that such failure was a breach of the duty of good faith and fair dealing. The Exchange demurred to the complaint, arguing that as a matter of law there was no potential for coverage based upon the allegations of the Cornell action and therefore no duty to defend or indemnify Bering. In March 2001, the court sustained the Exchange's demurrer without leave to amend.

Bering appeals, contending the trial court abused its discretion in sustaining the Exchange's demurrer without leave to amend because: (1) Bering demonstrated a potential for coverage existed, given the allegations of the Cornell complaint, the pertinent policy provisions and the extrinsic facts as pled in his first amended complaint; and (2) the Exchange's failure to defend Bering in the underlying action, given this potential for coverage, was in bad faith. We conclude the trial court did not abuse its discretion in granting the Exchange's demurrer without leave to amend, as the allegations of the Cornell complaint, as well as facts extrinsic to the complaint, failed to demonstrate any potential for insurance coverage under the policies issued by the Exchange that would give rise to a duty to defend. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Underlying Cornell Action*

In November 1997, Cornell brought an action against Bering, the Dyers, and Edward and Nancy Machado (together the Machados). Derek Bering was then a minor under the care of and living with the Dyers.¹ The first cause of action alleged general negligence of the parents/guardians in that the "[d]efendants, and each of them, are responsible for their child and step child, Derek Bering, who as stated within this pleading, conspired to steal, stole, and fraudulently used credit card accounts and numbers, prompted, encouraged, allowed and provided the means for others to commit crimes. Defendants are also liable pursuant to Civil Code^[2] Section 1714.1."³

The second cause of action alleged that Bering "stole, conspired to steal and otherwise by use of artifice and fraud deprived plaintiff of goods, monies and

¹ It is unclear from the record what relationship Bering had to the Machados.

² All further statutory references are to the Civil Code unless otherwise specified.

³ Section 1714.1, subdivision (a) defines the scope of the liability of parent or guardian for torts of a minor as: "Any act of willful misconduct of a minor which results in injury or death to another person or in any injury to the property of another shall be imputed to the parent or guardian having custody and control of the minor for all purposes of civil damages, and the parent or guardian having custody and control shall be jointly and severally liable with the minor for any damages resulting from the willful misconduct. [¶] Subject to the provisions of subdivision (c), the joint and several liability of the parent or guardian having custody and control of a minor under this subdivision shall not exceed twenty-five thousand dollars (\$25,000) for each tort of the minor, and in the case of injury to a person, imputed liability shall be further limited to medical, dental and hospital expenses incurred by the injured person, not to exceed twenty-five thousand dollars (\$25,000). The liability imposed by this section is in addition to any liability now imposed by law."

merchandise." The third cause of action alleged that "Bering and Does 1 through 10 did conspire to and actually did steal, misrepresent, obtain property by false pretenses, convert, fraudulently [*sic*] used credit cards, provided the means for, allowed, encouraged others to commit crimes including providing illegally obtained, maintained and or used credit card accounts." The Dyers were alleged only to be liable to the extent allowed by section 1714.1.⁴ There was also a prayer for exemplary damages against Bering and the Dyers in the third cause of action, to the extent allowed by section 1714.1, as a result of Bering's malice, fraud, and oppression as defined in section 3294.⁵ The facts supporting the claim for exemplary damages were alleged as follows: "Bering . . . conspired to and did steal merchandise from [Cornell] and his customers, fraudulently [*sic*] stole and used credit card numbers and did willfully allow others to use [] credit card numbers."

The fourth cause of action against Bering alleged negligent infliction of emotional distress in that Bering "negligently provided to others access to confidential data,

⁴ See footnote 2, *ante*.

⁵ Section 3294 provides in part: "(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant. [¶] . . . [¶] (c) . . . [¶] (1) 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. [¶] (2) 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. [¶] (3) 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant and thereby depriving a person of property or legal rights or otherwise causing injury."

knowledge and other actions that allowed others to steal, or otherwise illegally and tortiously use data of customers of [Cornell,]" which caused Cornell to suffer severe and extreme emotional distress. The fifth cause of action against Bering alleged negligence in the handling of the data of Cornell and negligence in the manner in which he allowed access to others of such data and otherwise which caused harm to Cornell, or that Bering negligently supervised, controlled and directed others, and said negligence caused damage to Cornell. The sixth cause of action alleged negligent infliction of emotional distress, essentially restating the allegations of the fifth cause of action for negligence.

B. Tender of Defense to the Exchange

In August 1997 the Dyers tendered a claim to the Exchange requesting a defense in the pending Cornell action. The Exchange denied this request, maintaining that, based upon the allegations of the Cornell action, there was no potential for coverage under the policies and hence no duty to defend.

Subsequent to the Exchange's denial of a defense, the Cornell action proceeded to arbitration. The arbitrator awarded \$45,662 in favor of Cornell and against Bering. In so doing, the arbitrator found that Bering was negligent in performance of his functions for Cornell's business. Thereafter, a judgment was entered against Bering in the Cornell action in the amount of \$45,662.

C. Pertinent Insurance Policy Provisions

In July 1996 the Exchange issued a condominium owners policy (the primary policy) to the Dyers, and in that same year also issued them a personal excess liability

policy (the excess policy). Bering was insured under these policies as a minor blood relative living at the premises of the named insureds.

The scope of the primary policy's personal liability coverage is defined by the following coverage clauses:

"We will pay all damages an *insured* becomes legally liable to pay because of: [¶] (a) *bodily injury* or *property damage* caused by an *occurrence* to which this Part applies; [¶] (b) *personal injury* to which this Part applies."

"We will, at our expense and through attorneys selected by us, defend any suit claiming damages for *bodily injury*, *property damage* or *personal injury* if covered under this Part, even if the allegations of the lawsuit are not true, groundless or fraudulent. Our obligation to defend ends when the amount we pay for damages resulting from one *occurrence* equals our limit of liability."

The operative terms bodily injury, property damage, personal injury, and occurrence are also defined in the primary policy. Bodily injury for purposes of personal liability is defined as "bodily harm, sickness or disease, including required care, loss of services and death resulting therefrom." Property damage "means physical injury to or destruction of or loss of use of tangible property."

As defined in the primary policy, personal injury "means injury which, during the policy period, arises out of one or more of the following: [¶] (a) false arrest, detention or imprisonment; [¶] (b) malicious prosecution, provided all actions of an *insured* or on behalf of an *insured* which gave rise to the claim of malicious prosecution occurred during the time that *insured* has been continuously insured under this policy; [¶] (c) libel, slander or defamation of character, provided the first publication or utterance which gave rise to the claim of libel, slander or defamation of character was made by or on behalf of

an *insured* during the time that *insured* has been continuously insured under this policy; [¶] (d) invasion of privacy, wrongful eviction or wrongful entry." Occurrence is defined in the policy as: "an accident, including injurious exposure to conditions, which during the policy period results in *bodily injury* or *property damage*."

The primary policy excludes losses for "[b]odily injury or *property damage* expected or intended by an *insured*." It also excludes coverage for personal injury "caused by a violation of a penal law or ordinance if that violation is committed by or with the knowledge or consent of an *insured*," and personal injury arising out of "an *insured's* intent to produce injury."

The excess liability policy coverage clause stated: "We will pay damages for which an *insured person* is legally liable because of *bodily injury, personal injury* or *property damage* caused by an *occurrence* to which this policy applies. Our payment will be reduced by the applicable *retained limit*. [¶] We will, at our expense and through attorneys selected by us, defend any suit claiming damages for *bodily injury, personal injury, or property damage* covered under this policy but not covered under *primary insurance* or under any other liability policy available to an *insured person*. . . . [¶] We will defend such suit, even though its allegations are not true, groundless or fraudulent. Our obligation to defend ends when the amount we pay for damages resulting from one *occurrence* equals our limit of liability."

The definition of bodily injury in the excess policy is almost identical to that in the primary policy. Property damage "means physical injury to or destruction of tangible property, including the loss of use arising out of the injury or destruction of tangible

property." Personal injury is defined in the same manner as in the primary policy.

Occurrence is also defined in the same manner as in the primary policy but the definition includes an additional provision: An occurrence means "an act or a series of acts of the same or similar nature which result in *personal injury* during the policy period." The excess liability policy also excludes coverage for "[b]odily injury, *personal injury* or *property damage* expected or intended by an *insured person*."

D. *The Dyers' action*

The Dyers brought an action alleging that the Exchange's refusal to defend them in the Cornell lawsuit constituted bad faith. The Exchange demurred for failure to state a claim and the demurrer was overruled. In overruling the Exchange's demurrer, the court found as follows: "Defendant characterizes the 5th cause of action in the *Cornell* action as one for negligence alleging that Plaintiff's son provided others with access to the information he had stolen. The Court doesn't read that cause of action quite that narrowly. The operative allegations of that cause of action are that 'Defendant Derek Bering and Does 1 - 10 were negligent in their handling of the data of Plaintiff and were negligent in the manner in which they allowed access to others of such data and otherwise.' Defendant supports its interpretation of this cause of action by the incorporation of all previous allegations, including those of intentional theft. However, this interpretation ignores the settled rule that the duty to defend is broader than the duty to indemnify and that any doubt as to whether the facts establish the existence of a defense duty must be resolved in the insured's favor [citation]. It may well be that

Defendant can establish it had no duty to defend at a later stage of this case, but it cannot due [*sic*] so at the demurrer stage given the pleadings before the Court."

E. The Instant Action

In Bering's original complaint he alleged that the Exchange breached the terms of the primary and the excess policies it issued to his parents as a minor blood relative living at the premises of the named insureds. Specifically, Bering alleged that the Exchange breached the express and implied terms of the policies in that they: (a) failed and refused to defend Bering or timely acknowledge such duty to defend Bering against the Cornell action; (b) failed to appoint and provide competent counsel in defense of that claim; (c) failed to reimburse Bering for costs incurred in the defense of the Cornell action; (d) failed to reimburse Bering for incidental and consequential damages related to the allegations, occurrences and circumstances giving rise to the Cornell claim; and (e) failed to attempt or enter into settlement negotiations in the Cornell action.

The second cause of action in the original complaint alleged a breach of the covenant of good faith and fair dealing. Bering alleged that the Exchange willfully and intentionally breached its covenant of good faith and fair dealing with Bering by: (a) unreasonably and without proper cause refusing to conduct a complete investigation into the facts giving rise to the allegations of the Cornell claim which would have resulted in their discovery of a duty to defend; (b) unreasonably and narrowly interpreting the policies in a manner calculated to deny benefits due Bering under the policies; (c) appointing attorneys with a conflict of interest favorable to the Exchange which resulted in a biased investigation and analysis of Bering's claim; and (d) that these willful and

intentional acts by the Exchange were the proximate cause of certain compensable losses to Bering in a sum to be determined at trial. Bering further alleged that these acts of the Exchange were done with an intent to vex, injure and annoy in a manner that was malicious within the meaning of section 3294,⁶ warranting the assessment of exemplary damages. The Exchange demurred to the original complaint on the grounds that the complaint and each of its causes of action failed to state facts establishing that the Exchange owed a duty to either defend or indemnify Bering in the Cornell action. In response to this demurrer and motion to strike Bering filed a first amended complaint for damages.⁷

The amended complaint added allegations that a judgment was rendered against Bering in the Cornell action in the amount of \$45,662, and that Bering was found by the arbitrator in that case to have been negligent in performance of his functions for Cornell's business. Bering also alleged that he was incarcerated for 17 months as a result of a criminal action involving the same events as the Cornell civil suit—eight months at Juvenile Hall and nine months in a group home. Bering further alleged that a demand was made by Cornell on the Exchange for \$5,000 to settle the Cornell action and, had that amount been paid, Cornell would not have reported the thefts to the police and they would not have pressed criminal charges. Cornell contacted the Exchange with a claim based upon his pending complaint against Bering in February 1997 which the Exchange

⁶ See footnote 4, *ante*.

⁷ All further references to the complaint are to the first amended complaint.

denied the following day. Counsel for Cornell contacted the Exchange in May 1997 seeking an explanation of why they denied Cornell's claim. The Exchange responded that it did not cover intentional acts.

Bering also alleged that in August 1997 the Dyers tendered a claim to the Exchange requesting a defense in the pending Cornell action. The Exchange denied this request. The Dyers then forwarded a letter from Cornell's counsel to the Exchange, which indicated that the Cornell suit could be settled for a fraction of the potential damages if counsel's offer were accepted immediately. The Exchange maintained that it had no duty to defend the Cornell action based on the allegations of Cornell's complaint. In November, the Dyers forwarded Cornell's first amended complaint to the Exchange. The Dyers pointed out to the Exchange that the amended complaint contained additional causes of action sounding in negligence, and including negligent infliction of emotional distress. The Dyers then informed the Exchange that regardless of the allegations of the original complaint, the amended complaint provided a clear basis upon which a defense and indemnification obligation arose. The Exchange continued to maintain that there was no coverage under the policies and hence no duty to defend.

Bering's amended complaint also renewed the allegations of the original complaint that the Exchange breached their contractual obligation to defend Bering in the Cornell action and that this failure was a willful and intentional breach of the duty of good faith and fair dealing. Bering renewed his allegation that the Exchange's refusal to defend or indemnify was done with the intent to vex, injure and annoy in a manner malicious within the meaning of section 3294 and that this failure warranted punitive damages.

In response to the complaint, the Exchange moved to strike those portions of the complaint seeking punitive damages, asserting that there were insufficient facts alleged to support a request for punitive damages. They also renewed their demurrer to the complaint in its entirety, asserting that the complaint failed to state any cause of action against the Exchange. The Exchange argued that the facts alleged in Bering's complaint did not establish a duty to defend or indemnify, and that absent a contractual duty there was no breach. They also argued that a bad faith claim could not be maintained unless there was an established contractual duty, i.e., policy benefits, due the insured. Further, the Exchange maintained that there was no coverage under either the primary or excess policies based on the allegations of the Cornell claim. Specifically, they concluded that Bering had failed to establish the potential for coverage under the policy and hence he could not establish a duty to defend.

In Bering's opposition to the demurrer, he asserted that the Cornell claim alleged Bering was negligent in allowing his friends to steal merchandise from Cornell. He alleged that this allegation and the others asserted in the Cornell complaint established a potential for coverage under the policies and, therefore, the Exchange breached its duty to defend.

On March 16, 2001, the court issued a tentative ruling sustaining the Exchange's demurrer to the first amended complaint without leave to amend and ordering their motion to strike off calendar as moot. Bering requested oral argument.

At oral argument Bering asserted that the Exchange had a duty to defend based on the first amended complaint because of the fourth and fifth causes of action alleging

negligence in that Bering allowed others access to confidential data. The Exchange responded by asserting that theft of credit card numbers resulting in Cornell having to pay the credit card companies was an economic loss not covered by the policies. The court found that Bering's alleged negligence in allowing the theft of credit card customers' identities was not a loss covered under the policies and that the other causes of action alleged intentional conduct by Bering which was also not covered by the policies. Therefore, the court found there was no duty on the part of the Exchange to defend, and the court sustained the Exchange's demurrer without leave to amend.

On April 19, 2001, a judgment of dismissal was entered. This timely appeal follows.

DISCUSSION

A. Standard of Review

In reviewing the sufficiency of a complaint against a general demurrer, the demurrer is treated "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Further, the complaint is read as a whole and given a reasonable interpretation. (*Ibid.*) "When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment." (*Ibid.*) However, for strictly legal issues, leave to amend is properly denied "where the facts are not in dispute and the nature of the claim is clear, but no liability exists under substantive law." (*Lawrence v. Bank of America* (1985) 163

Cal.App.3d 431, 436.) If the defect can be cured, "the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.)

B. *Applicable Law*

1. *Interpretation of insurance contracts*

The determination of whether an insurance policy provides a potential for coverage and a duty to defend is a question of law. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18 (*Waller*).) The rules governing policy interpretation require the court to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would attach to it. (*Ibid.*) An insurance policy is a contract between the insurer and the insured, and a fundamental rule of contract interpretation is that it must give effect "to the 'mutual intention' of the parties" at the time of formation. (*Ibid.*) "Such intent is to be inferred, if possible, solely from the written provisions of the contract." (*Ibid.*) These provisions are given a clear and explicit meaning by interpreting them in their ordinary and popular sense, unless the parties give the terms a technical or special meaning. (*Ibid.*)

2. *Insurer's duty to defend*

"It has long been a fundamental rule of law that an insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement." (*Waller, supra*, 11 Cal.4th at p. 19.) This duty to defend is broader than the duty to indemnify and applies even to claims

that are "'groundless, false, or fraudulent.'" (*Ibid.*) But when there is no possibility of coverage under the policy, the insurer has no duty to defend. (*Ibid.*)

"*Gray* [v. *Zurich Insurance Co.* (1966) 65 Cal.2d 263] and its progeny have made it clear that the determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy. Facts extrinsic to the complaint give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy." (*Waller, supra*, 11 Cal.4th at p. 19.) "Conversely, where the extrinsic facts eliminate the potential for coverage, the insurer may decline to defend even when the bare allegations in the complaint suggest potential liability." (*Ibid.*) Even though the duty to defend is broad, it is limited to the nature and kind of risks covered by the insurance policy. (*Ibid.*)

Under a clause requiring the insurer "'to defend the insured in any action alleging an injury under the policy, 'even if such suit is groundless, false or fraudulent'" (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 297), the insurer has the duty to defend even if the insurer has knowledge that the injury is not in fact covered. (*Ibid.*) "'But it is equally true that the insurer is not required to defend an action against the insured when the complaint in that action shows on its face that the injury complained of is not only not covered by, but is excluded from the policy.'" (*Ibid.*)

C. Analysis

The Exchange agreed to pay "all damages an *insured* becomes legally liable to pay because of: [¶] (a) *bodily injury* or *property damage* caused by an *occurrence* to which this Part applies; [¶] (b) *personal injury* to which this Part applies." The primary and

excess policies define an occurrence as an accident, including injurious exposure to conditions, which during the policy period results in *bodily injury* or *property damage*, or an act or a series of acts of the same or a similar nature which result in *personal injury* during the policy period. The primary and excess policies contain standard exclusionary language that excludes coverage for losses for bodily injury, property damage, or personal injury intended by an insured. The policies also exclude coverage for personal injury caused by violation of penal law or ordinance if the violation is committed with the knowledge or consent of the insured. Thus, to demonstrate a potential for coverage under the primary or excess policies, Bering must show that the Cornell claim alleged an accident or injurious exposure to conditions which resulted in bodily injury or property damage to Cornell, that the alleged injury was not intended, or that it alleged an act or series of acts of the same or similar nature resulting in personal injury to Cornell that was not intended by Bering or done with Bering's knowledge or consent.

A general liability policy is ordinarily written in two parts: the insuring agreement, which states the risks covered by the policy, and the exclusionary clauses, which remove coverage for risks that would normally fall within the insuring clause. (*Waller, supra*, 11 Cal.4th at p. 16.) Normally, whether a risk falls within the insuring agreement is determined before evaluating whether it is excluded by the exclusionary clauses. (*Ibid.*) However, for the sake of clarity and ease of analysis, we will review the allegations of the Cornell complaint clearly excluded from coverage before determining whether there is a potential for coverage under either the primary or excess policy giving rise to a duty to defend.

The first three causes of action in Cornell's complaint alleged either that Bering conspired to steal or stole credit card account information, or goods, monies and merchandise from Cornell. Regardless of whether the damages alleged were of the type covered by the policies, the alleged misconduct of the first three causes of action involved intentional acts by Bering clearly excluded from coverage under the policy (i.e. either he intentionally stole or knowingly allowed others to do so). Thus, as the terms of the policy provided no potential for coverage, the Exchange acted properly in denying a defense as to these claims. (*Waller, supra*, 11 Cal.4th at p. 25.)

This leaves the fourth, fifth, and sixth causes of action alleging that Bering's negligence caused certain damages to Cornell. The fifth cause of action against Bering alleged negligence in the handling of credit card information and negligence in allowing access to others of such data, which caused harm to Cornell. Property damage under both the primary and excess policies is defined as physical injury to or destruction of or loss of use of tangible property. Customers' credit card information stolen as a result of the alleged negligence of Bering for which Cornell is liable does not constitute the destruction or loss of use of tangible property. According to Bering, the arbitrator in the Cornell action found that Bering had left his "friends" inside the store to watch things while he went outside to smoke, and during that time his "friends" stole the items in question. This alleged negligence of Bering facilitating his friends' intentional theft of customer credit card information for which Cornell is liable is an economic loss not covered by the policies. In *Waller, supra*, 11 Cal.4th at page 17, the court evaluated a standard commercial general liability policy providing coverage for property damage

defined identically to the Exchange's primary and excess policies. The court found that "the occurrence or act leading to coverage must be an injury to tangible property, not to one's economic interest." (*Id.* at p. 26.) "[S]trictly economic losses like lost profits, loss of goodwill, loss of the anticipated benefit of a bargain, and loss of an investment, do not constitute damage or injury to tangible property covered by a comprehensive general liability policy. [Citations.]" (*Id.* at p. 17.) Similarly, the Cornell action was about stealing of identities and the resulting financial harm to Cornell, a purely economic loss not covered by the Dyers' insurance policies. Theft of this credit card information also does not constitute bodily injury as it is not bodily harm, sickness or disease. Also, theft of this information does not arise out of any of the enumerated acts comprising personal injury under the policies. Therefore, it is clear given the plain language of the primary and excess policies that the alleged theft of the credit card information by Bering's friends was not covered under the insuring clause.

The fourth cause of action alleged negligent infliction of emotional distress in that Bering "negligently provided to others access to confidential data, knowledge and other actions that allowed others to steal, or otherwise illegally and tortiously use data of customers of [Cornell]" which cause him to suffer severe and extreme emotional distress. The sixth cause of action alleged that defendants negligently supervised each other, resulting in severe emotional distress.

In *Waller, supra*, 11 Cal.4th at page 10, the California Supreme Court granted review "to decide whether a commercial general liability insurer is required to defend a third party action that seeks incidental emotional distress damages caused by the insured's

noncovered economic or business torts." The Supreme Court affirmed the Court of Appeal's conclusion that "allegations of incidental emotional distress damages flowing from noncovered causes of action fall outside the scope of a commercial (formerly called comprehensive) general liability (CGL) policy and present no potential for coverage under the policy." (*Ibid.*)

Here, given the plain meaning of the operative terms of the primary and excess insurance policies and the allegations of the complaint, there was no possibility of coverage and hence no duty to defend. However, "[f]acts extrinsic to the complaint give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy." (*Waller, supra*, 11 Cal.4th at p. 19.) "Conversely, where the extrinsic facts eliminate the potential for coverage, the insurer may decline to defend even when the bare allegations in the complaint suggest potential liability." (*Ibid.*)

The extrinsic facts upon which Bering relies concern the arbitration in the Cornell action. Bering asserts that the arbitrator found that he was negligent and liable for damages amounting to \$45,662. Further, Bering contends that the arbitrator found that Bering was negligent in that he left his friends in Cornell's store while he went outside to smoke a cigarette, and while he was away they stole merchandise and credit card information of customers. Bering's principal contention on appeal is that the theft of this merchandise constitutes the loss of use of tangible property, and the loss of use of tangible property is property damage under the primary and excess policies.

However, theft of store merchandise does not constitute loss of use of tangible property under the policies. Neither the primary policy nor the excess policy defined loss

of use. However, in *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 818-819, the Court of Appeal held that "loss of use" of property is different from "loss" of the property itself. The court explained the distinction as follows: "[A]ssume that an automobile is stolen from its owner. The value of the 'loss of use' of the car is the rental value of a substitute vehicle; the value of the 'loss' of the car is its replacement cost." (*Ibid.*) The merchandise allegedly stolen by Bering's "friends" was not to be "used" in a conventional sense. Cornell was undoubtedly planning to sell the merchandise in order to realize a profit. When the merchandise was stolen Cornell lost the potential benefit of the sale of the merchandise. It was an economic loss that did not constitute "loss of use" under the policy.

The Exchange was not required to defend Bering against the Cornell action, nor indemnify him against the resulting judgment, because the allegations of the Cornell complaint and extrinsic facts pled by Bering in this action make it clear that the injuries complained of were not covered by either the primary or excess policies. Absent a duty to defend by the Exchange under either the primary or excess policies, there can be no breach of either insurance contract.

Bering also alleged that the Exchange breached its duty of good faith and fair dealing by failing to defend Bering or conduct a proper and unbiased investigation into the facts and circumstances surrounding the Cornell claim. However, because a contractual obligation is the underpinning of a bad faith claim, such claim cannot be maintained unless policy benefits are due under the contract. (*Waller, supra*, 11 Cal.4th at p. 35.) Therefore, it is clear that if there is no potential for coverage under the terms of

the policy, and hence no duty to defend, there can be no bad faith claim because such claims are based on a contractual duty between the insurer and the insured. (*Id.* at p. 36.)

In appellant's reply brief, Bering for the first time requests leave to amend his complaint to better plead causes of action to state a claim showing a potential for coverage. It is true that when a demurrer is sustained without leave to amend, a request to amend can be made in the first instance to the appellate court. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386.) However, it is not up to courts to figure out how the complaint can be amended to state a cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) It is the plaintiff's burden to show "in what manner he [or she] can amend [the] complaint and how that amendment will change the legal effect of the pleading." (*Ibid.*) Bering has failed to set forth in his reply brief what amendments he would make and how they would cure defects in his claim.⁸ Accordingly, Bering's request for leave to amend is denied.

⁸ Furthermore, appellants generally may not raise new issues in a reply brief. Absent good cause shown for failing to assert them before, points raised for the first time in a reply brief will ordinarily not be considered. (*Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946, 979.)

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

KREMER, P. J.

BENKE, J.